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AUTHORITIES CITED

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-711

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AS AMICUS CURIAE

This brief *amicus*, in support of the position of respondent, is filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, with the consent of the parties, pursuant to Rule 42 of the Rules of this Court.

INTEREST OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

The International Association of Machinists and Aerospace Workers, AFL-CIO, (IAMAW), is a labor organization composed of nearly 1,000,000 members representing employees in collective bargaining throughout the United States in numerous and varied industries. In calling and conducting strikes in support of the economic goals of the workers it represents, and in maintaining the strike solidarity essential to the effective prosecution of a strike, it is vitally concerned with the question whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking, by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation. It has therefore through its affiliates been heavily engaged in the litigation of this question.

The Board's lead decision on the question, on which its order in this case rests, is pending before this Court on the petition for a writ of certiorari of an IAMAW affiliate in *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.*, No. 71-1417. Other cases of IAMAW affiliates are either awaiting judicial determination[1] or judicial proceedings have been withheld pending the outcome of this case.[2] The IAMAW therefore

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[1] *N.L.R.B.* v. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW, AFL-CIO*, C.A. 9, No. 71-3068; see also, *Local 1255, IAMAW* v. *N.L.R.B.*, 456 F.2d 1214 (C.A. 5, 1972).

[2] *IAMAW, AFL-CIO, and Local Lodge 598 (Union Carbide Corp.)*, 196 NLRB No. 114, 80 LRRM 1079 (1972); *District Lodge No. 99, IAMAW, AFL-CIO (General Electric Co.)*, 194 NLRB No. 163, 79 LRRM 1208 (1972).

files this brief in order that it may be heard on the question which its affiliates have in litigation and which has pervading significance in making strike decisions.

STATEMENT

The rationale on which the decision of the National Labor Relations Board in this case rests was expressed by it in its lead decision in *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO,* 185 NLRB No. 23 (1970) (reprinted *infra,* pp. 1a-13a). The Board's order in that case was in relevant part enforced by the Court of Appeals for the District of Columbia Circuit in *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.,* 79 LRRM 2443 (1972). A petition for a writ of certiorari to review the judgment of the District of Columbia Circuit is pending. *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.,* No. 71-1417.

We believe that the underlying question is this case will be better illuminated by viewing it in the cross-light which is shed by the varying fact situations in which it arises. Accordingly, in the statement which follows, we set forth the facts as they appear in the lead decision in *Booster Lodge No. 405.* In the ensuing argument we confront the question with the perspective afforded by both this case and *Booster Lodge No. 405.*

I. The Strike

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this

plant are represented in collective bargaining by Booster Lodge No. 405 (the Union) and its parent, IAMAW (A. 3-4). A single employer-wide collective bargaining agreement covers IAMAW-represented units at the Michoud plant and at other facilities of the Company located elsewhere in the United States (*ibid.*) About 1,900 production and maintenance employees work at the Michoud plant (A. 67).

A collective bargaining agreement covering the IAMAW-represented units at the Michoud plant and other Company facilities was in effect from May 16, 1963 through September 15, 1965 (A. 66-67, 3). No accord upon new contract terms was reached upon expiration of the agreement (A. 67, 5). A lawful employer-wide strike over the economic issues in dispute, and picketing in support of the strike, began on September 16, 1965 and ended on October 3, 1965 (A. 67, 5; 85-86).

The strike was preceded by a union meeting at which a strike vote was taken (A. 105, 184, Tr. 21). The Constitution of the IAMAW provides that "a strike vote . . . shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote" (G.C. ex. 5, Art. XVIII, sec. 2, p. 54). The Constitution further requires that no strike may be declared without the approval of the Executive Council of the IAMAW, except that, "In an extreme emergency, . . . the I.P. [International President] may authorize a strike pending the submission to and securing the approval of the E.C. [Executive Council]" (*Id.*, Art. XVIII, Secs. 1, 2, pp. 53-54). The By-Laws of the Union provide that, "The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution" (G.C. ex. 6, p. 4).

A new agreement was reached on October 3, 1965, retroactive to October 2 (A. 67, 5; 85-86). The strike and picketing, which lasted eighteen days, embraced the Michoud plant (A. 67, 5, 25, n. 28).

The new 1965 agreement, like the old 1963 agreement, contained a union security provision known as maintenance of membership. Under this provision employees who are or become union members are required to maintain their membership during the contract term, but employees who are not members need not join if they give timely written notice that they do not desire to become members (A. 67, 4-5; 221-223).

II. The Internal Union Definition of Improper Conduct of a Member and the Internal Union Procedure for Consideration of Alleged Offenses.

The Constitution of the IAMAW defines "improper conduct of a member" and establishes a full trial and appellate procedure to determine the existence and punishment of alleged offenses (A. 214-218).

Among the offenses defined as misconduct of a member is "Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 6; 214). The Constitution provides that this offense, like other "actions or omissions" constituting "misconduct by a member," shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (A. 68, 5-6; 214). Disqualification from holding office for a period not exceeding five years is expressly enumerated as a penalty (A. 216).

To institute a proceeding to determine the existence and punishment of alleged offenses, a member may

prefer written charges of misconduct against another member, which shall be filed with the president of the Local Lodge who in turn serves a copy on the accused (A. 214). A trial committee is promptly convened, and its first task is to "conduct an investigation of the charges and decide whether there is sufficient substance to warrant a trial hearing being held" (A. 215). If trial is warranted, the accused is informed "of the charges against him and when and where to appear for trial," and "a reasonable time . . . to prepare his defense" is afforded (A. 215). "If a member fails to appear for trial when notified to do so, the trial shall proceed as though the member were in fact present" (A. 215). "Both the plaintiff and the defendant shall have the privilege of presenting evidence and being represented either in person or by attorney (the attorney being a member of the I.A.M.A.W.)" (A. 215).[3] Full opportunity to be heard and defend is afforded (A. 215-216).

After the conclusion of the trial, the trial committee is required to "consider all of the evidence in the case and thereafter agree upon its verdict of 'guilty' or 'not guilty.' If the verdict be that of 'guilty,' the trial committee shall then consider and agree upon its recommendation of punishment" (A. 216). The trial committee reports its determination and reasons at the next regular meeting of the Local Lodge (A. 216). The

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[3] Although not of record in the *Booster Lodge* proceeding, the IAMAW's settled interpretation is "that the word 'attorney' means any member of the IAM, and he does not have to be a licensed lawyer or the member of any bar association." Record, *International Association of Machinists, Oakland Lodge No. 284 (Morton Salt Co.)*, Case No. 20-CB-1776, GC ex. 8, p. 2. See *Sawyers* v. *Grand Lodge, International Association of Machinists*, 279 F. Supp. 747, 756 (E.D. Mo. 1967).

trial committee first reports its verdict and reasons with respect to guilt or innocence, and its verdict is then "submitted without debate to a vote by secret ballot of the members . . . in attendance" (A. 216). If the members concur in a "guilty" verdict, "the recommendation of the committee as to the penalty" is submitted in a separate report and "voted on by secret ballot of the members then in attendance" (A. 216). "The penalty recommended by the trial committee may be amended, rejected, or another punishment substituted therefor" by the members (A. 216). The members may reverse a "not guilty" verdict of the trial committee, and impose the punishment they deem appropriate (A. 216).

The accused is promptly notified in writing of the decision with respect to his guilt or innocence and of the penalty imposed if found guilty (A. 216). The accused or accuser may appeal to the International President of the IAMAW, who is empowered "to affirm or to modify or reverse, in whole or in part, the decision . . . , or to remand the proceedings for further trial . . . , or to impose any penalty or fine which he deems to be required, including expulsion" (A. 217). Successive appeals are provided from the decision of the International President to the Executive Council of the IAMAW, and from the decision of the Executive Council to the IAMAW convention, "or to the membership at large by submission" of the appeal "to . . . referendum . . ." (A. 217-218).[4]

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[4] The sufficiency of this procedure was examined and upheld by the Court of Appeals for the District of Columbia Circuit in *I.A.M.* v. *Friedman*, 102 U.S. App. D.C. 282, 252 F.2d 846 (1958), cert. denied, 357 U.S. 926 (1958).

III. The Imposition of Fines for Strikebreaking

Some 143 production and maintenance employees, who were members of the Union when the strike began, crossed the picket line and worked at the Michoud plant during all or part of the period of the strike (A. 67, 5). Some 24 of these strikebreakers made no attempt to resign from the Union during the strike period (A. 67). The remaining 119 strikebreakers did resign from the Union during the strike period (A. 67-68). Of these 119, 61 resigned from the Union and returned to work *subsequent* to their resignation, and 58 resigned from the Union but returned to work *before* their resignation (A. 67).

The Union tried all employees who were members of the Union when the strike began who were known to have worked during the strike, and assessed a penalty against each found guilty of strikebreaking, without regard to whether the accused had resigned from the Union during the strike period or had started to work subsequent to his resignation (A. 3, 13 and n. 11; 198-200). In late October or early November 1965, the appointed trial committee notified each accused (1) that he had been charged with "Accepting employment . . . in an establishment where a strike . . . exists" in violation of the IAMAW Constitution; (2) that the trial committee "has met and feel there is sufficient evidence to hold a trial"; (3) that a trial of the accused had been set for the time and place specified in the notice; and (4) that "you have the right to have an attorney (the attorney being a member of the IAMAW) to defend you. Under the Constitution, if you fail to appear when notified, the trial shall proceed as though the member were in fact present" (A. 68, 6; 228).

The ensuing proceedings resulted in a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "Mistrial" without retrial as to a fourth (A. 239, 127). The remaining accused were found guilty of strikebreaking but a different penalty was assessed against a particular accused depending upon the class within which he fell. Those accused who appeared before the trial committee, apologized, and pledged loyalty to the Union were in effect fined fifty percent of their strikebreaking earnings and disqualified from holding union office for varying periods (A. 68, 7; 188-189, 204-205). The exact penalty assessed against the members of this class reads as follows (A. 229):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00. This fine to be suspended providing you pay 50% of your earnings while working during the strike, and agree to attend all regular meetings of this Lodge during the next twelve (12) months.
>
> 2. That you be denied the privilege of holding office in the IAMAW for the time stated at your trial. If you worked less than three (3) days—one (1) year; three (3) to ten (10) days—three (3) years; ten (10) days or more—five (5) years.

Those accused who did not appear for trial and were found guilty were fined $450 and disqualified from holding office for five years (A. 68, 6-7; 193). The exact penalty assessed against the members of this class reads as follows (A. 230):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00.

> 2. That you be denied the privilege of holding office in the IAMAW for a period of five (5) years.

The full $450 fine was assessed against 108 individuals, and the 50-percent-of-strikebreaking-earnings fine against 35 individuals (A. 67, n. 3). All were informed of their right to appeal the decision to the International President of the IAMAW (A. 7, n. 4; 229-230). No appeals were taken (A. 7, n. 4).

Payments of the fines has followed a checkered course. No $450 fine has been paid (A. 68). Reduced fines have been paid in full in eighteen instances and in part in three instances (A. 68; 238, 127). Payments have averaged $40 (A. 68; 205-206), and payments in full have ranged from a low of $10, a mid-point of $54.80, and a high of $120 (A. 238-239, 127). On November 3, 1967, the Union wrote to some individuals who had been "fined 50% of the wages"; the Union stated that "your fine has yet to be paid in full", requested that the individual contact the Union "to discuss payment since we are now in the process of turning all fines over to our attorney for collection", and concluded that "Failure to do so could cause your fine to be increased to $450.00 as was noted at your trial" (A. 68-69, 7-8; 231-232). On February 2, 1966, the Union's attorney had written to 91 individuals fined $450 requesting "immediate payment in full" and noting that "Your failure to respond promptly will require our filing suit against you . . ." (A. 8; 233, 71, 72). Suit has been instituted against nine individuals in local courts to recover the $450 fine assessed against each (A. 69, 8; 210-212, 240-241). The Company has undertaken the defense of these suits (A. 5). The outcome of the suits has not been determined (A. 69).

IV. The Board's Decision

The claim before the Board was that the Union restrained or coerced employees in the exercise of their right to refrain from concerted activity for mutual aid or protection in violation of Section 8(b) (1) (A) of the Act. The claim divided into two parts. First, although the Union's rule against strikebreaking is valid, the Union violated Section 8(b) (1) (A) by fining its members in an *unreasonably* large amount for violation of the rule, and by seeking or threatening to seek collection of that allegedly unreasonable fine by court action. Second, independently of the reasonableness of the fine, the Union violated Section 8(b)(1)(A) by fining in any amount those persons who had resigned from the Union for that strikebreaking activity in which they engaged *subsequent* to their resignation.

The first claim—the reasonableness of the fine—was dismissed by the Board (*infra,* p. 9a, n. 16). It relied for its rationale on its decision in *David O'Reilly,* 185 NLRB No. 22, 75 LRRM 1008 (1970), which it issued on the same day as the opinion in this case. In *David O'Reilly,* one member dissenting, the Board held that, given the settled validity of a rule requiring members "to honor an authorized picket line" and the settled permissibility of punishing breach of the rule by "union fines (or court enforcement of same)", Congress did not intend "to have the Board regulate the size of these fines and establish standards with respect to their reasonableness" (75 LRRM at 1010). Rather, related as it is to "the fairness of union discipline meted out to protect a legitimate union interest" (*id.* at 1011), the issue of the reasonableness of a fine is to be determined by a court in a proceeding to collect or set aside the fine. The "local courts are the more logical

tribunals for the establishment of standards of reasonableness" (*id.* at 1010).

The Board, one member dissenting, decided the second claim—pertaining to the situation of a person who had resigned from the Union—in favor of the view that the Union violated Section 8(b)(1)(A) by fining a person who had resigned from membership for engaging in strikebreaking *subsequent* to his resignation. The premise of the Board's decision is that, while a member is bound to observe his union's valid rules during his period of membership, "the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished" (*infra,* pp. 6a-7a). Accordingly, the Union "violated Section 8(b)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations" (*infra,* p. 9a). However, as to those resigners who engaged in strikebreaking *before* their resignation, the Union retained "the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them" (*infra,* p. 10a).

Member Gerald A. Brown dissented from this branch of the Board's decision (*infra,* p. 12a). He would hold that resignation in the midst of a strike does not free a member to engage in strikebreaking; resignation should not be given effect to allow the member to shed his obligation of union fealty at the very moment that it matters most. He stated in part that (*infra,* p. 13a):

> Each of the employees involved here, and in all other situations of which I am aware, was a mem-

ber of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and by-laws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.

V. The Decision of the Court of Appeals for the District of Columbia Circuit

On review, the Court of Appeals for the District of Columbia Circuit, in agreement with the Board, affirmed its conclusion that "the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage" (79 LRRM at 2450). However, in disagreement with the Board, the Court of Appeals held that "it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised" (*id.* at 2452), and it directed the Board on remand to determine "the questions relating to the reasonableness of the fines imposed by the Union" (*id.* at 2455).

VI. The Petition for a Writ of Certiorari

On May 1, 1972, the Union filed its petition for a writ of certiorari to review the judgment of the District of Columbia Circuit (No. 71-1417), and it presented the following two questions (Pet. p. 2):

1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking, by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.

2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

Of these two questions, the first only is directly presented in this case, and the argument which follows is therefore confined to it.

SUMMARY OF ARGUMENT

The Board holds that, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him forthwith from his union obligation to refrain from strikebreaking in that strike for its future duration. It predicates this conclusion on its view that, as a matter of contract law, the "contract-constitution" "becomes a nullity" upon resignation, and *ipso facto* the "member's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" instanter (*infra,* pp. 6a-7a). It does not consider that the duty to refrain from strikebreaking for the dura-

tion of the existing strike may be implied notwithstanding resignation. It fortifies its rigid view of contract law by drawing upon a so-called "statutory policy" said to militate against the implication.

The Board's view of contract law is radically wrong. Treating the union constitution as a contract, it is elementary that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon explicit terms. Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of any agreement.

Given this orientation the question is whether the union constitution is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes . . . ." *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833, 834 (1931). This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking. Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficaceous it may be to sever other member-

ship obligations, should not as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most. For "mutual reliance is implicit in all strike votes; many employees would hesitate to forego several weeks or months of pay if they knew their cohorts were free to cross the picket line at any time merely by resigning from the union." *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 446 F.2d 369, 372 (C.A. 1, 1971), cert. granted, 405 U.S. 987 (1972).

There is no "statutory policy" which militates against implying a duty to refrain from strikebreaking during the existing dispute notwithstanding resignation. This Court held in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967), that Section 8(b)(1)(A) of the Act does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines." And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .'" (*id.* at 182). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The

statute does not require a union to permit a mid-strike resignation to be used as an escape hatch to break the strike. The statute is no more hospitable to the strikebreaker-resigner than it is to the strikebreaker-member.

In short, a union constitution, faithfully interpreted in keeping with its fair purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and "statutory policy" does not militate against this implication but is instead quite in harmony with it.

ARGUMENT

A MEMBER'S MID-STRIKE RESIGNATION FROM HIS UNION DOES NOT FREE HIM FROM HIS UNION OBLIGATION TO REFRAIN FROM STRIKEBREAKING IN THAT STRIKE FOR ITS DURATION.

I. Preliminary Statement

The Board holds that, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him from his union obligation to refrain from strikebreaking in that strike for its future duration. The premise of this conclusion is that the obligations assumed upon the acquisition of membership subsist only during the period of membership and therefore terminate forthwith upon resignation. At the heart of this premise is the Board's concept of the "membership relationship" established by "a contract-constitution" to which the individual "becomes a party" upon "joining the union" (*infra*, p. 6a). In the Board's view the contract-constitution "becomes a nullity" upon resignation, and *ipso facto* the "member's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" forthwith (*infra*, p. 7a). To fortify

its view as to the meaning of a union constitution as a matter of contract law, the Board draws upon the "statutory policy to prevent coercion of employees for exercising Section 7 rights" safeguarded against union encroachment by section 8(b)(1)(A) of the Act (*infra*, pp. 8a-9a).

It is thus the Board's thesis that, absent an express contrary stipulation, resignation results in blanket nullification of the applicability of the union constitution to govern the former member's future conduct for any purpose, and requires absolute and abrupt extinction of all existing obligations in total disregard of any circumstances. It is this thesis which we contest as fundamentally fallacious. Treating the union constitution as a contract, it is elementary that "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise,"[5] and that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon express terms.[6] Thus, although wanting in explicitness, a promise may nevertheless be "fairly . . . implied", for "the whole writing may be 'instinct with an obligation', imperfectly expressed."[7] And so, in "construing contracts, courts must look not only to the specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other

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[5] 1 Corbin, Contracts, 2 (1950).

[6] 3 Corbin, Contracts, 276-355 (1950).

[7] Cardozo, J., in *Wood* v. *Duff-Gordon*, 222 N.Y. 88, 90, 118 N.E. 214 (1917). See also, *Marrinan Medical Supply* v. *Ft. Dodge Serum Co.*, 47 F.2d 458, 463-465 (C.A. 8, 1931); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 104-106 (1962).

words place themselves in the same position the parties occupied when the contract was entered into, and view the terms and intent of the agreement in the same light in which the parties did when the same was formulated and accepted."[8]

This Court just last term gave forthright expression to the indispensability of implication in determining the existence and meaning of a contract. ". . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 Corbin on Contracts, §§ 561-672A. Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' *Id.*, at § 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' *Ibid.*" *Perry* v. *Sinderman*, 40 U.S.L.W. 5087, 5090 (S. Ct., 1972).

Given this orientation the question is whether the union constitution is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes. . . ."[9] This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking. Every member depends on every other to withhold his labor from the

[8] *Miller* v. *Miller*, 134 F.2d 583, 588 (C.A. 10, 1943).

[9] *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833, 834 (1931).

struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficaceous it may be to sever other membership obligations, should not as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most. For "mutual reliance is implicit in all strike votes; many employees would hesitate to forego several weeks or months of pay if they knew their cohorts were free to cross the picket line at any time merely by resigning from the union." *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO,* 446 F.2d 369, 372 (C.A. 1, 1971), cert. granted, 405 U.S. 987 (1972).

We turn to an elaboration of this position. We shall show, in essence, (1) that a union constitution, faithfully interpreted in keeping with its fair purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and (2) that "statutory policy" does not militate against this implication but is instead quite in harmony with it.

II. This Court's Validation in Allis-Chalmers of the Imposition of a Court-Collectible Union Fine as a Discipline Against Strikebreaking.

We begin with this Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967). The Court answered "no" to the question "whether a union which threatened and imposed fines, and brought suit

for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8(b)(1)(A) of the National Labor Relations Act of engaging in conduct 'to restrain or coerce' employees in the exercise of their right guaranteed by § 7 to 'refrain from' concerted activities." 388 U.S. at 176.[10] Underpinning this holding was recognition that strikebreaking was fundamentally offensive to union solidarity essential to effective economic action (*id.* at 180, 181-182):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by a majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . .
>
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> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

[10] See also, *Rocket Freight Lines Co.* v. *N.L.R.B.* 427 F.2d 202, 205-206 (C.A. 10, 1970); *U.O.P. Norplex Division* v. *N.L.R.B.*, 445 F.2d 155 (C.A. 7, 1971).

The "history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in the light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195).

III. A Union Constitution, Although Silent on the Subject of the Effect of Resignation, Cannot Reasonably Be Interpreted To Authorize Strikebreaking Subsequent to a Mid-Strike Resignation Where the Individual Was a Member of the Union at the Inception of the Strike, for the Implied Obligation of Loyalty Binds Him Notwithstanding Resignation To Refrain From Strikebreaking for the Duration of the Existing Strike.

Given the duty confirmed by *Allis-Chalmers* to refrain from strikebreaking, which every member assumes upon acquisition of membership, the question is whether resignation in the midst of a strike forthwith terminates that duty with respect to that very strike. The answer turns on whether the union constitution contemplates that a mid-strike resignation authorizes instant conversion of the duty to refrain from strikebreaking into a freedom to break the existing strike. It is to the last degree unimaginable that the union constitution is fairly capable of that interpretation.

The constitution is the union's charter of government. It orders the relationship of the union and its members to preserve and promote organizational effec-

tiveness. A prominent organizational need is the ability of the union to prosecute a strike. It is impossible to suppose, from the viewpoint of either the union as an institution or of any member as part of that institution, that the constitution allows desertion from the ranks in the midst of a strike. ". . . [N]egotiations are carried on with the prospect of an immediate or possible break of diplomatic relations and a resort to force. If the break comes, the union goes to war and the need for discipline is obvious. The employer is the enemy; giving him any aid or comfort is treason. To supply him with labor is to furnish him the weapon with which the battle is fought and is clear treason." [11]

It is plain that the union constitution as the governing instrument cannot be reasonably interpreted to mean that a mid-strike resignation has the expected effect of authorizing the defector to break the existing strike. On the contrary, "derived from implied covenants of good faith and fair dealings" which inhere in every contract,[12] the least that the constitution contemplates is that the obligation to refrain from strike-breaking, undertaken before the strike and activated by it, shall endure for the duration of the strike.

The obvious escapes understanding only because the constitution is silent upon the effect of a mid-strike resignation. But silence presents the interpretative question; it does not decide it. Silence simply puts the trier to the task of extrapolating the probable meaning of the constitution based on the subject matter, rela-

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[11] Summers, *Disciplinary Powers of Unions*, 3 Ind. & Lab. Rel. Rev. 483, 489 (1950).

[12] *Local 1912, I.A.M.* v. *United States Potash Co.*, 270 F.2d 496, 498 (C.A. 10, 1959), cert. denied, 363 U.S. 845 (1959).

tionship, and interests to be served in the light of the circumstances from which the problem emerges.

Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of a collective bargaining agreement.[13] This interpretative function is no less a necessity, if perhaps less forthrightly recognized, in the interpretation of other contracts.[14] "Parties to a contract may, either intentionally or by oversight, omit certain terms or leave them to be determined in the future. When litigation ensues, the court, if it is not to frustrate the parties' dominant intent to make a contract, must often fill the gaps 'if it is possible to reach a fair and just result.' Although courts declare that they will not make a contract for the parties, they must frequently complete the contract by filling in the omitted terms. Such completion is, in a very real sense, an act of creation."[15]

This approach is indispensable to the realistic reading of a union constitution. "Membership in a union

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[13] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-582 (1960). See also, *Perry* v. *Sinderman*, 40 U.S.L.W. 5087, 5090 (S. Ct., 1972).

[14] Summers, *Collective Agreements and the Law of Contract*, 78 Yale L.J. 525, 529-530 (1969).

[15] *Id.* at 551. ". . . [A] sound judicial tradition stresses concern for context, purposes, needs, and consequences in resolving the ambiguities and the gaps that exist in all agreements. See, Llewellyn, *What Price Contract? An Essay in Perspective*, 40 Yale L.J. 704, 746 n. 86 (1931); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 475-476 . . . (1960) (dissenting opinion)." Meltzer, *Labor Law, Cases, Materials, and Problems*, 746 (1970).

contemplates a continuing relationship with changing obligations as the union legislates in a monthly meeting or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship." [16] We are required to ask whether that special relationship has during its pre-strike subsistence induced reliance on and created expectations of unity for the strike's duration so that the duty of loyalty inhering in the relationship should not in fairness be abruptly severed by a resignation in the midst of a strike. In considering that question there is no more room for dogmatic assertion that resignation must forthwith willy-nilly terminate all obligations flowing from the membership relationship than there would be for a cognate claim that divorce must automatically end all obligations flowing from the marriage contract.

The perspective which the Board lacks is provided by looking to what courts do when dealing with the termination of a contractual relationship. Thus, "where an exclusive franchise dealer under an implied contract, terminable on notice, has at the instance of a manufacturer or supplier invested his resources and credit in establishment of a costly distribution facility for the supplier's product, and the supplier thereafter unreasonably terminates the contract and dealership without giving the dealer an opportunity to recoup his investment, a claim may be stated." [17] So too, a "provi-

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[16] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1056 (1951).

[17] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391 (C.A. 8, 1968). See also, Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465.

sion which would limit the termination rights of a party may be implied into the bargain under some circumstances." [18] Similarly, an agreement of indeterminate duration is terminable, but only after a reasonable lapse of time and upon reasonable notice.[19] Likewise, the liberty to quit employment is subject to the disability that in future employment the employee may not exploit the use of confidential information acquired in the former employment to the disadvantage of the former employer.[20] Similarly, resignation of a carrier from a shipping conference does not bar the conference from trying the carrier for preresignation infractions in accordance with *changed* procedures instituted *subsequent* to resignation.[21] Finally, just last term, in considering the status of a teacher whose employment was not protected by "an explicit tenure provision" and who had not been rehired for the next school year, this Court observed that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure" despite the absence of an "explicit tenure system . . . ." [22]

In all these situations the courts implied, or asserted the power to imply, just and reasonable conditions upon the termination of the relationship which the

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[18] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391, n. 3 (C.A. 8, 1968).

[19] *Miller* v. *Miller*, 134 F.2d 583, 588-589 (C.A. 10, 1943); *Boeing Airplane Co.* v. *N.L.R.B.*, 85 U.S. App. D.C. 116, 174 F.2d 988, 991 (1949).

[20] *N.L.R.B.* v. *I.L.G.W.U.*, 274 F.2d 376 (C.A. 3, 1960); *Junker* v. *Plummer*, 320 Mass. 76, 67 N.E.2d 667 (1946).

[21] *Pacific Coast European Conference* v. *F.M.C.*, 439 F.2d 514 (C.A.D.C., 1970).

[22] *Perry* v. *Sinderman*, 40 U.S.L.W. 5087, 5090 (S. Ct., 1972).

agreement did not in terms express. No less is required in this case. Given the crucial expectation of utter membership solidarity during the critical period of a strike, and the rightful reliance of every member on every other to withhold his labor for the duration of the strike, a mid-strike resignation does not justly and reasonably comprehend lifting the existing duty to refrain from strikebreaking in the current controversy. The duty antedated the strike; observance of it was activated by the strike; performance should be required for the duration of the strike.

To meet this showing all that the Board states in its brief in this case (p. 16), echoing the view of the District of Columbia Circuit in *Booster Lodge* (79 LRRM at 2448), is that "it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or bylaws." But this is a poor crutch. First, as the author whom the District of Columbia Circuit cites to support its view makes clear, this stricture is limited to the innovation of a prescript in a situation where no rule at all exists; it does not apply to the interpretation of the scope of a rule which is in being.[23]

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[23] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1060-61 (1951):

> The prevailing rule that a member may not be punished for implied offenses cannot be justified on the ground that it protects a member from being disciplined for conduct which he believes to be proper. When the conduct is as flagrant as in some of the cases mentioned, the member is fully aware that he has acted improperly. Furthermore, the rule gives little practical protection to union members. It does not compel unions to define punishable offenses and to specify the penalties to be inflicted. Instead, the gaps are filled by such vague catchalls as "disloyalty," or "conduct detrimental to the best interest of the union." Union resolutions are made enforceable by including the offense, "disobedience to regu-

Second, even as so limited, the author disapproves the approach, observing that it permits a member to escape discipline although he "is fully aware that he has acted improperly", "gives little practical protection to union members", and serves instead merely to relieve judges of the task of judging.[24] Third, this Court has discredited the approach as a matter of federal law, as it emphasized in *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). This Court concluded, upon an examination of the legislative history of section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, that Congress deliberately declined to limit permissible discipline to violation of "a previously published, written union rule", or to miscreant conduct that "the union had proscribed prior to the union member having engaged in such activity" (*id.* at 242-244). The federal approach instead is to entrust unions with self-governing autonomy (*id.* at 242, 244-245):

> We find nothing in either the language or the legislative history of § 101(a)(5) that could justify . . . a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members.
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> . . . § 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which

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lations, rules, mandates and decrees of the Local or International," and difficulties with penalties are eliminated by making all offenses punishable by fine, suspension, or expulsion.

The function of the rule against implied offenses is not nearly so much to protect the members, as it is to protect the courts. If the courts recognized implied obligations, they would have to determine what constituted a "serious offense."

[24] See preceding note.

a union may discipline its members. And if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope.

Lastly, the discredited approach invoked by the Board and the District of Columbia Circuit is dubious even as an accurate rendition of the common law. "It would seem that where a member's act is clearly in derogation of an obvious group interest, either because the group's dedication to particular ideas or goals is clear or because the member's act is especially hostile to more general group interests, the association could properly expel under a very vaguely worded rule, or indeed without any rule." Note, *Developments in the Law, Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 985, 1018 (1963).

In short, if a union is to be faulted for construing its prohibition against strikebreaking to apply to a mid-strike resigner for the duration of the existing strike, it should be on a better basis than the invocation of an interpretative crutch which either refrains from exercising judgment or conceals the basis for it. Federal law is better served by candid confrontation of a problem than by seeking refuge in rote.

IV. The Rule That, Where a Union Constitution Is Silent on the Subject of Resignation, a Member Is at Liberty To Resign at Will, Does Not Support the View That the Mid-Strike Resigner Is Free To Engage in Strikebreaking in the Existing Strike.

To support its view that a mid-strike resigner is free to engage in strikebreaking in the existing strike subsequent to his resignation, the Board apparently invokes the rule that, where the union constitution is silent upon

the subject, members are at liberty to resign forthwith at will (*infra*, p. 7a and n.11). But invocation of the rule to support strikebreaking is quite inapt. For the situation in which that rule has been applied is utterly different from the present situation, and regard for the difference bars application of the rule to sanction strikebreaking.

In all situations in which the Board has applied the rule, the question has been whether under a union security agreement known as maintenance of membership, by the terms of which a nonmember need not join the union but an existing member must retain his membership in the union, membership is required on the part of a person who had resigned from the union before the effective date of the agreement.[25] To that question the Board has answered that, as the union constitution did not limit the time or manner of resignation, a person ceased to be a member on resignation and therefore the agreement did not require membership of that person because he was a nonmember when it became effective.

Accordingly, all that the rule apparently invoked by the Board stands for is that, in the application of a maintenance of membership agreement, a person becomes a nonmember on resignation in the absence of a contrary specification in the union constitution. This rule means that a member who resigns during a strike

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[25] *Aeronautical Industrial District Lodge 751*, 173 NLRB 450, 452 (1968); *Local 340, International Brotherhood of Operative Potters*, 175 NLRB 756 (1969); *Local Union No. 621, United Rubber Workers*, 167 NLRB 610 (1967); *New Jersey Bell Telephone Co.*, 106 NLRB 1322, 1324 (1953), enforced *sub nom. Communication Workers of America* v. *N.L.R.B.*, 215 F.2d 835, 838 (C.A. 2, 1954).

is not obligated to join a union under the terms of a maintenance of membership agreement entered into at the end of the strike because he had become a nonmember before the effective date of the agreement. But it means no more.

Considered in the context of its application, therefore, neither the rule nor any rationale supporting it persuasively relates to the question this case presents, namely, whether a mid-strike resignation frees the erstwhile member to engage in strikebreaking in an existing strike. It is one thing to say that a person becomes a nonmember on resignation so that an ensuing maintenance of membership agreement is not applicable to him. Or that a person becomes a nonmember on resignation so that he is no longer under a financial obligation to pay future dues and assessments to the union. It is quite another thing, however, to say that liberty to engage in strikebreaking in the current controversy is the reasonable and expected consequence of a mid-strike resignation. Only an either-or mentality, requiring that things must be all one or all another, can fail to consider whether the same act may not entail a diversity of consequences. Moderate interpretative sophistication encounters no strain in finding that a particular status may have different attributes for different purposes.[26] Accordingly, to say that a mid-strike resignation renders a subsequent maintenance of membership agreement inapplicable to the resigner is not to begin to say that it frees the resigner to engage in strikebreaking in the existing strike.

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[26] *E.g., Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 190-193 (1941).

V. The Board's Mistaken Reliance on Expressions in Opinions of This Court Said To Suggest the View That Instant Freedom To Engage in Strikebreaking Is the Necessary Consequence of a Mid-Strike Resignation.

The Board apparently takes the position that certain expressions in opinions of this Court suggest the view that instant freedom to engage in strikebreaking is the necessary consequence of a mid-strike resignation. We turn to this claim.

1. The Board states that this Court in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196-197 (1967), "expressly refused to pass on the legality of the imposition of a fine upon 'limited members' of the union", from which the Board deduces that "in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A)" (*infra*, p. 7a). The Board deduces too much from too little.

In *Allis-Chalmers*, under one type of union membership available in that case, "an employee is required only to become and remain 'a member of the Union . . . to the extent of paying his monthly dues . . .'" (388 U.S. at 196). As to that type of limited member—one who has undertaken only to pay dues to the union—this Court stated that whether the prohibition of Section 8(b)(1)(A) of the Act "would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view" (*id.* at 197).

To intimate no view as to whether a member whose obligation is limited to paying dues may be disciplined for strikebreaking is to intimate no reservation relevant to this case. A member whose union obligation is lim-

ited to paying dues is by negative implication a member who has not undertaken to fulfill any other obligation of membership; and it is surely arguable that a person who has not bound himself to refrain from strikebreaking cannot be fined for it. But we deal in this case, as the Court did in *Allis-Chalmers,* with persons who had full membership status (*id.* at 196-197),[27] and full membership embraces the obligation to refrain from strikebreaking (*id.* at 181-182, *supra,* pp. 20-22). The question in this case, not presented in *Allis-Chalmers,* is whether a mid-strike resignation frees the full member to engage in strikebreaking in the existing strike. We have shown that it does not, and nothing in this Court's reservation concerning a limited member whose union obligation is confined to paying dues remotely suggests that it does.

2. In *Scofield* v. *N.L.R.B.,* 394 U.S. 423 (1969), this Court held that Section 8(b)(1)(A) of the Act did not bar a union from fining a member for violating a valid union rule against exceeding a production ceiling. In reaching this conclusion the Court noted *inter alia* that the rule was enforced against "union members who are free to leave the union and scape the rule" (*id.* at 430). According to the Board, "[b]y observing that members could 'leave the union and escape the rule,' the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline" (*infra,* p. 8a).

Since in *Scofield* the violation of the rule occurred during the term of a collective bargaining agreement,

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[27] An evidentiary showing is required to establish that a member has less than full membership status. As the Court stated, "Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary." *Allis-Chalmers,* 388 U.S. at 196.

and since the union security clause in that agreement obligated an existing member to remain a member for the duration of the agreement (394 U.S. at 424, n.1), presumably the Court meant, when it said that "union members . . . are free to leave the union and escape the rule," that the member was free to renounce all union obligations except the payment of union dues. For a union security agreement, while it may do no more, may indubitably bind a person to pay union dues and initiation fees at the risk of losing his job if he does not. "Under § 8(a)(3) the extent of an employee's obligation under a union security agreement is 'expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core.' "[28]

Accordingly, when the Court states that "union members . . . are free to leave the union and escape the rule," it envisages the member's exercise of his option during the contract term to convert from a full member (subject to all union obligations) to a limited member (subject only to the obligation to pay dues). But the option to convert to limited membership in *Scofield,* like the status of limited membership reserved in *Allis-Chalmers,* has nothing to do with the question that the instant case presents. Granted that a member may change from full to limited membership during the contract term, or may resign his membership altogether upon expiration of the contract, the question still remains of the fair effect to be given to a mid-strike resignation as it relates to the rule against strikebreaking. The member by resigning of course escapes the rule against

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[28] *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197, n. 37 (1967), quoting from *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

strikebreaking in any *future* controversy, but does that mean that resignation frees him from observance of the rule at least for the duration of the existing strike? Surely that question has not been answered—it has not even been broached—by the statement in *Scofield* that a member could escape observance of the production ceiling rule by leaving the union. There is a world of difference between a production ceiling rule and a strikebreaking rule, and therefore a world of difference in the time when leaving the union may fairly abrogate observance of the one rule but not the other. And it is just the demands of a strike situation, which the Court did not at all address in *Scofield,* which make the difference.

Accordingly, this Court's phrasal reference to "union members who are free to leave the union and escape the rule" (394 U.S. at 430)cannot be read with the indiscriminate openendedness that the Board attributes to it. As the First Circuit observed in this case (446 F.2d at 374), "We do not understand this language to mean that union members must be free to leave the union and escape the rule at any time and under all circumstances. Indeed, we do not see how that interpretation could be correct since in *Scofield* itself the Court recognized that a valid union security clause was in effect at the time of the alleged unfair labor practice."

3. The Board quotes from this Court's opinion in *N.L.R.B.* v. *Marine and Shipbuilding Workers of America,* 391 U.S. 418, 424 (1968), that "§ 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned." The Board then states that "the imposition of discipline upon nonmembers can hardly be deemed an internal affair" (*infra,* p. 8a). The Board begs the question.

The effect to be given to a mid-strike resignation on enforcement of a rule against strikebreaking is surely part of a union's "legitimate internal affairs." If the union constitution had in terms stated that a mid-strike resignation does not relieve the member of his existing duty to refrain from strikebreaking in the current controversy, the union could hardly be faulted on the ground that it was legislating on a matter which was none of its internal business (*infra,* pp. 43-49). Just and reasonable regulation of the terms on which a member may resign is an obvious function of any membership association.

The Board's error lies in its unparticularized use of the word "nonmembers." The Board packages as "nonmembers" persons who have never been union members with persons who seek to resign their existing membership and assumes that both are to be treated alike. But the two are obviously not the same in fact, and whether for particular purposes they should be treated differently in law is the question presented. That question cannot be satisfactorily answered by question-begging assumptions as to the content of "internal affairs" or the fungibility of "nonmembers."

4. The upshot is that the quotations which the Board snips from the Court's opinions simply do not answer the present question. The present question is new. There is no point to the pretense that the answer has already been given.

VI. The Suggestion That a Member Is Bound To Refrain From Strikebreaking for the Duration of the Strike Notwithstanding Resignation Only if at Its Inception He Individually Assented to the Strike.

The First Circuit held, in disagreement with the Board, that in the circumstances of this case a member's mid-strike resignation did not free him to engage in strikebreaking subsequent to his resignation. In *Booster Lodge No. 405,* the District of Columbia Circuit held, in agreement with the Board, that in the circumstances of that case a member's mid-strike resignation did free him to engage in strikebreaking subsequent to his resignation.

In denying enforcement of the Board's order, the First Circuit suggested that the circumstances in this case may be different from those in *Booster Lodge* (also known as the *Boeing* case) (446 F.2d at 372, n. 5):

> . . . [T]he *Boeing* case, *supra,* may be distinguishable on its facts since in *Boeing* the fines were authorized by a general provision in a union constitution, rather than by a specific decision of the membership adopted in the context of a particular strike. In *Boeing* the Board emphasized that "the Union had not warned members about the possible imposition of disciplinary measures." Also, the *Boeing* opinion did not consider whether any of the employees who crossed the picket line had originally voted to support the strike.

In *Booster Lodge,* the District of Columbia Circuit embraced the distinctions suggested by the First Circuit, and in reliance on them stated that "we believe that the [*Granite State*] decision is inapposite to the present fact situation," reasoning that (79 LRRM at 2449):

> Although the court in *Granite State* upheld the right of the union involved to impose fines on

strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case. In *Granite State,* the Board conceded that all of the fined employees had voted in favor of the strike in question. It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Furthermore, all of those who were disciplined in *Granite State* had been expressly prewarned of possible punishment for strikebreaking, while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation.

The First Circuit thus holds, and the District of Columbia Circuit does not disagree, that a member despite his resignation is at the least bound to refrain from strikebreaking for the duration of a strike when at the outset of the strike he made his own *individual* decision to go out on strike. But the District of Columbia Circuit holds, unlike the First Circuit which reserves decision on that question, that a member by resigning may renounce the institutional decision to strike at least in the absence of a showing that he individually assented to the decision initially.

This difference suggests the possibility that a member is bound notwithstanding resignation to refrain from strikebreaking for the duration of the strike only if at its inception the member individually supported

the decision to strike. The Board does not agree, nor do we, that the legal consequence of resignation can turn on whether or not the member at the inception of the strike individually supported or opposed the group decision to strike. But our reasons sharply differ.[29]

1. The essence of the solidarity indispensable to effective strike action is that a member is bound by the institutional decision to strike whether or not he was individually opposed to that group decision. A member is required to refrain from strikebreaking despite his dissent from the decision to strike. A member does not by his dissent create a personal option to refrain from striking by resigning. Membership is not divided into two classes, one class composed of those members who by individually assenting to strike are bound to that choice for the duration of the strike, and another class

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[29] Although the First and District of Columbia Circuits mutually acknowledged ditinctions between *Granite State* and *Booster Lodge*, it is apparent that the underlying rationale of the two courts is in conflict. While the First Circuit suggested the distinctions between *Booster Lodge and Granite State*, it explicitly stated that "[w]e express no opinion, however, as to whether these distinctions are determinative" (446 F.2d at 372, n. 5, see also *id.* at 374, n. 8). The District of Columbia Circuit in *Booster Lodge*, while purporting to rest on the distinctions that the First Circuit identified, nevertheless noted that "[t]o the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it" (79 LRRM 2449, n. 19). Subsequent to both decisions the Court of Appeals for the Fifth Circuit rejected the Board's application of its postresignation holding to the levy of a fine in which the sole sanction for nonpayment was debarment from union membership. *Local 1255, IAMAW v. N.L.R.B.* 456 F.2d 1214 (1972). The Fifth Circuit noted that "[t]o the extent that [the District of Columbia Circuit's decision in] *Boeing* may be read to suport the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectively decline to follow it." *Id.* at 1216, n. 1.

composed of those members who by individually dissenting from the strike are free to abandon the strike when and as they choose by resigning. The meaning of a union is that the contrariety of individual choice is forged into a single will once the group decision is taken. The reality of unified action is that each member is bound for the duration of the strike by the group decision to strike, whatever his own original personal choice, which he cannot escape by resigning.

2. To turn the allowability of strikebreaking subsequent to resignation on a showing of a member's individual original dissent from the strike decision is incompatible with the variety of means by which unions make strike decisions. Federal law does not, and state law cannot, prescribe the means by which unions make strike decisions (*International Union, United Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950)); indeed, federal law "does not require majority authorization for any strike" (*id.* at 458). Instead, the means by which strike decisions are made within a union are exclusively a matter of union self-government and internal organization. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958).

There are three principal methods by which strike decisions are made within a union: (a) by open vote of the members; (b) by secret ballot of the members; and (c) by the members' delegation of the strike decision to a strike committee or similar body. Only where the decision is made by open vote is it at all ascertainable what the member's original choice may have been, and even then the evidentiary problems of reliable after-the fact determination would be formidable. Where the dcision is by committee, the member's only formal participation in the process is to designate the constituency

of the committee; he does not himself vote. Where the decision is by secret ballot, the whole point of that method is that the member's individual vote shall not be known. Accordingly, when two of the three principal means by which strike decisions are made do not and cannot disclose the member's original individual choice, it is a practical impossibility to make the legal consequence of resignation turn on whether at the inception of the strike the member supported or opposed the strike decision.

3. The predominant means by which strike decisions within a union are made is by secret ballot.[30] The method required of its subordinate units by the IAMAW is typical. Thus, in *Booster Lodge,* in order to authorize the strike, a strike vote by secret ballot was mandatory, a three-fourths majority vote in favor of the strike was necessary to call the strike, and the strike call was further dependent on having the sanction of the Executive Council of the International Union (*supra,* p. 4).[31]

As thus presented in the typical posture of the IAMAW's method of calling a strike, the heart of the question is whether the minority is bound by the majority's choice to strike made in a secret ballot election. The answer rests in the indispensability to effective labor action of binding the entirety of the members for the duration of the strike to the institutional decision

[30] See the unpublished study, Collective Bargaining and Strike Provisions of National Union Constitutions, prepared for the use of the Federal Mediation and Conciliation Service by Herbert J. Lahne, a Department of Labor economist, reprinted *infra*, p. 15a.

[31] In 1970, the IAMAW amended its Constitution to require a two-thirds rather than a three-fourths majority vote to call a strike.

to strike that the majority has made. And the essence of a secret ballot is its secrecy, a secrecy which must be broken if effect is to be given to the notion that a member is bound by the institutional decision only if he himself individually favored it when it was made. In short, "the majority rules" (*J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 339 (1944)), and within the compass of effective strike action there is no room for individual defection from the collective decision, whether or not the member was personally for or against the strike at its inception.

VII. There Is No "Statutory Policy" Which Militates Against Interpreting a Prohibition Against Strikebreaking as Requiring a Mid-Strike Resigner To Refrain From Strikebreaking for the Future Duration of the Existing Strike.

We return to our starting point. In *Booster Lodge*, the provision of the IAMAW Constitution pursuant to which the resigners were disciplined proscribed "accepting employment . . . in an establishment where a strike . . . exists" (*supra*, p. 5). This provision does not specify whether or not it applies to bar strikebreaking in an existing strike subsequent to resignation. The Board would read the prohibition as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *except* following resignation. The Union interprets it as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *notwithstanding* resignation. As between the two rival interpretations of a union constitutional provision—one barring strikebreaking *except* following resignation and the other barring it *notwithstanding* resignation—the choice is obvious. A union constitution premised on maintaining strike solidarity simply cannot be rationally read to allow strikebreaking. We need

hardly add that "Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable." *Vestal* v. *Hoffa,* 451 F.2d 706, 709 (C.A. 6, 1971), cert. denied, 40 U.S.L.W. 3543, May 15, 1972. See also, *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233, 241-245 (1971).

Insight may be afforded by looking at the issue as if the result for which we contend had been incorporated in the constitution in so many words. The constitution would then read substantially as follows: resignation in anticipation or in the course of a strike shall not relieve the member from his duty to refrain from strikebreaking in the upcoming or existing strike. Such an explicit restriction would doubtless be given effect. A constitution may limit resignation to the manner and on the conditions prescribed, so long as the restrictions are just and reasonable.[22] To require that a present member refrain from strikebreaking in an existing or impending strike is obviously a just and reasonable restriction upon resignation.

In the absence of such explicitness, then, the question is whether the implication of that restriction better approximates the just and reasonable expectation of the parties than does the implication that resignation forthwith frees the erstwhile member to engage in strikebreaking. Since it is a union constitution that we are interpreting, and the imperative of a membership relationship which is at issue, it is perfectly patent that the implied terms on which the relationship may be dissolved fairly and reasonably contemplate that the exist-

[22] *N.L.R.B. v. International Union, United Automobile Workers,* 320 F.2d 12 (C.A. 1, 1963).

ing obligation of loyalty to the union politic to refrain from strikebreaking shall at the least endure for the duration of the current controversy in which the entirety of the membership is engaged and in which utter unity is indispensable.

But, says the Board, "statutory policy" is opposed to that implication (*infra*, p. 8a). The District of Columbia Circuit similarly says that "an extremely important national policy militates against the imposition of such an implied obligation" (79 LRRM at 2448). But neither is willing to commit itself to the view that an explicit restriction against strikebreaking in an existing strike subsequent to resignation would violate Section 8(b)(1)(A) of the Act. The Board on brief contents itself with the statement that it "has not yet had occasion to consider whether a different accommodation would be warranted where the union's constitution or bylaws expressly limited the right of a member to resign during an ongoing strike" (p. 17, n.14). The District of Columbia Circuit similarly expresses "no opinion . . . concerning the legality" of such a provision, and it likewise "intimate[s] no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation" (79 LRRM at 2449, n. 20).

This straddle will not do. The statute either does or does not allow a union to bind a mid-strike resigner to a duty to refrain from strikebreaking in an existing strike. If it does, no "statutory policy" is offended because the restriction is implied rather than express. A statute which countenances an express restriction does not permit the invention of a "statutory policy"

which condemns an implied restriction. The Board and the District of Columbia Circuit cannot shelter their ambivalence "in that circumambient aura, so often euphemistically described as 'the policy of the statute.' "[23]

It is therefore necessary to face up to the question that the Board insinuates but does not choose to confront. And the answer is clear. An implied restriction against strikebreaking by a mid-strike resigner does not, any more than an explicit restriction would, run afoul of the bar of Section 8(b)(1)(A) against restraining an employee in the exercise of his right to refrain from strike activity conferred by Section 7 of the Act. This is inherent in the teaching of *Allis-Chalmers*. The Court held in *Allis-Chalmers* that Section 8(b)(1)(A) does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines" (*supra*, p. 22). And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' " (*supra*, p. 21). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The statute does not require a union to permit

[23] L. Hand, J., concurring in *McComb* v. *Scerbo*, 177 F.2d 137, 141 (C.A. 2, 1949).

a mid-strike resignation to be used as an escape hatch to break the strike.

This conclusion is demonstrable by returning to the specific statutory premise on which *Allis-Chalmers* rests. The predicate of that decision is that imposition of a fine for violation of a valid union rule is not under any circumstances open to contest under section 8(b)(1)(A) if the fine is enforceable only by debarment from union membership for nonpayment. Writing for the majority, Mr. Justice Brennan stated that (388 U.S. at 191-192):

> At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment.

The dissenters appear to share this view. Mr. Justice Black wrote for them, and while first seeming to reserve this matter (388 U.S. at 203), he finally stated that (*id.* at 214):

> . . . I have already indicated that the proviso to § 8(b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted.

The issue which divided the Court in *Allis-Chalmers* was, not whether section 8(b)(1)(A) prohibited a fine that was enforceable solely by debarment from union membership, but whether court action to collect the fine was a permissible added sanction. The Court of course held that it was. "A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (*id.* at 192).

The identical analysis is applicable to the strikebreaker-resigner as to the strikebreaker-member. If the penalty imposed on the resigner were a fine, but if enforcement of the fine were limited to debarment of the resigner from reacquisition of membership in the union until the fine were paid, the sanction for nonpayment would be expressly privileged by the proviso to section 8(b)(1)(A), for it would be confined to "the right of the labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In this situation, as the Court of Appeals for the Fifth Circuit has held, the "sanction for nonpayment of the fine was . . . confined to the 'acquisition or retention of membership,' a domain which is reserved to the Union under the Act" *Local 1255, IAMAW* v. *N.L.R.B.*, 456 F.2d 1214, 1217, (1972). The Fifth Circuit explained that (*ibid.*):

> We believe the Union's right to expel a member, or deny readmission to an ex-member, for not paying a fine is clearly protected by the proviso to § 8(b)(1)(A). The proviso makes no distinction between acts done while a member and those done while not a member. Either may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled . . . [the defector] unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.
>
> In summary, we hold only that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his postresignation strikebreaking when the fine is enforceable only by expulsion from the union.

At this juncture we reach the same point in the analysis that the Court confronted in *Allis-Chalmers*. As

a fine for strikebreaking, enforceable by debarment from the union until the fine is paid, may be levied alike against the strikebreaker-member and the strikebreaker-resigner, the only question which remains is whether court action to collect the fine is a permissible added means of enforcement. The Court in *Allis-Chalmers* held that court enforcement of the fine was allowable against the strikebreaker-member, and there is no slightest reason why it should not also be allowable against the strikebreaker-resigner. In either case the "efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (388 U.S. at 192).

But, we are told on brief, as a constituent of a member's "right" to refrain from strike activity, a member should be free to abandon the strike without risking union discipline for his defection, whenever the hardship of striking becomes greater than he cares to bear, so long as he is willing by resigning to give up the benefits of union membership; this is called "reasonable accommodation" (Bd. br. pp. 17-18, 21). We call it strikebreaking. We are "accommodated" out of the means of enforcing discipline to maintain the strike solidarity essential to effective strike action. We are in the name of a "fair balance" required to favor the summer soldier and the sunshine patriot to the detriment of the steadfast striker who rightfully relied on group unity when the strike was undertaken. And we are gifted with this cost-benefit analysis, not by the Board whose opinion will be searched in vain for it, but by "appellate counsel's *post hoc* rationalizations for agency action", a wholly impermissible basis on which to sustain administrative decision. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438,

442-444 (1965); see also *F.T.C.* v. *Sperry and Hutcheson Co.*, 405 U.S. 233, 245-250 (1972).

Indeed, were the Board to say that a mid-strike resignation must be given effect to allow subsequent strikebreaking, it would arrogate to itself a role which is statutorily denied it. A union's refusal to countenance a mid-strike resignation as an excuse for strikebreaking is a union's use of one part of its economic weaponry to secure satisfactory contract terms. To maintain that a union is required by law to tolerate mid-strike desertion through resignation is thus to assert the statutory power to divest the union of one means of waging economic warfare. Yet it is central to this statute that the Board has no such power. It is not to function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands"; it is not "to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ . . . ." *N.L.R.B.* v. *Insurance Agents' International Union*. 361 U.S. 477, 497-498 (1960). The Board has no authority to "balance" away the union's or the employer's means of self-protection. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316-318 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278, 290-292 (1965).

In short, when a union reads its prohibition against "accepting employment . . . in an establishment where a strike . . . exists" to bar strikebreaking in an existing strike subsequent to resignation, it is making an interpretation of the prohibition which is in utter harmony with its underlying purport. And when it is said that such an interpretation runs afoul of "statutory policy," the assertion bespeaks ignorance of what strike solidarity means and disrespects the limitation on the

Board's power against intermeddling in the economic weaponry employed to wage economic warfare.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted,

PLATO E. PAPPS
LOUIS POULTON
1300 Connecticut Avenue, N.W.
Washington, D. C. 20036

BERNARD DUNAU
912 Dupont Circle Building, N.W.
Washington, D. C. 20036

Attorneys for International Association of Machinists & Aerospace Workers, AFL-CIO

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